No. 17-1625

IN THE

Supreme Court of the United States

RIMINI STREET, INC., *et al.*,

Petitioners,

v.

ORACLE USA, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* COPYRIGHT ALLIANCE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE COPYRIGHT ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

Pursuant to Rule 37 of the Supreme Court of the United States, *amicus curiae* the Copyright Alliance respectfully submits this brief in support of the request of respondents Oracle USA, Inc., *et al.*, that the decision of the United States Court of Appeals for the Ninth Circuit be affirmed.[1]

INTEREST OF *AMICUS CURIAE*

The Copyright Alliance is a nonprofit, nonpartisan 501(c)(4) membership organization dedicated to promoting and protecting the ability of creative professionals to earn a living from their creativity. It represents the interests of individual authors from a diverse range of creative industries—including, for example, writers, musical composers and recording artists, journalists, documentarians and filmmakers, graphic and visual artists,

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. Only *amicus curiae* made such a monetary contribution. Respondent Oracle America, Inc. is a member of the Copyright Alliance. Other Copyright Alliance members may join other *amicus* briefs submitted in this case. The Clerk has noted Petitioners' and Respondents' blanket consents to *amicus curiae* briefs, dated October 24, 2018 and October 26, 2018, respectively, on the docket.

photographers and software developers—and the small businesses that are affected by the unauthorized use of their works. The Copyright Alliance's membership encompasses these individual artists and creators, creative union workers, and small businesses in the creative industry, as well as the organizations and corporations that support and invest in them.

Consistent with its mission of advocating policies that promote and preserve the value of copyright, and protecting the rights of creators, the Copyright Alliance participates as an *amicus* in this case to help this Court understand, from the perspective of content creators of all sizes, how allowing recovery of "full costs," including non-taxable costs, under 17 U.S.C. § 505 advances the purposes of, and policies behind, copyright law. From the members' perspective, this approach would further the goals of the Copyright Act by incentivizing copyright owners to protect their rights through litigation where appropriate, encouraging parties to pursue meritorious claims and defend against frivolous ones, and promoting the full and fair adjudication of copyright cases. The Copyright Alliance also chooses to participate as an *amicus* in this case to warn the Court of the significant negative effects the adoption of Petitioners' proposed construction of the statute would have not only on copyright owners and litigants, but on copyright law as a whole.

SUMMARY OF ARGUMENT

As a matter of law and policy, the Court should affirm the Ninth Circuit's decision and interpret 17 U.S.C. § 505 to allow recovery of "full costs" expended in litigation. The statute, the policy underlying it, and the interpretation of the Copyright Act have all confirmed the concept that the district courts have the sound discretion to award the prevailing party compensation for due costs incurred in enforcement or defense of claims.

Awards of "full costs" in copyright cases have a long history in the law, reaching back to the 1909 Copyright Act. Making full costs available in the Court's discretion also falls into line with the policies of the Copyright Act. The reading that Respondents advocate furthers several purposes of the Copyright Act, including encouraging parties to bring meritorious claims that protect creators' rights and bolstering the litigation of meritorious defenses that further the development of copyright law.

Encouraging meritorious claims advances the purposes of the Copyright Act for the same reasons that the Court in *Kirtsaeng v. John Wiley & Sons, Inc.* and *Fogerty v. Fantasy Inc.* found, as the victor's likelihood of recovering full costs from the opposing party gives him an incentive to litigate the case to the end. Such litigation, in turn, enriches the general public through access to creative works by

demarcating the boundaries of copyright law as clearly as possible.

Unlike in many areas of the law, creators and other copyright owners cannot look to large damage awards to help offset the full costs of litigating a case. Where parties are seeking injunctive relief, which is often most critical in copyright cases, recovery of all costs becomes even more important to offset the high threshold of litigating in federal court. Making full costs available is even more important in the digital age, where copyright cases often require unique treatment, including increased use of technical or specialized experts. These experts often come with a hefty price tag, but they are vital to the proper adjudication of the case.

Fundamentally, moreover, if a creator is going to be incentivized to create, a decision to leave the creator with no option but to invest her own funds in non-taxable litigation costs yields the result of turning the incentives upside down. If the cost of enforcement is too expensive, then the copyright that the law grants to the creator becomes devalued, if not entirely meaningless. The copyright laws are designed to encourage the protection and enforcement of the copyright; assuring the copyright owner that there is no chance to recover certain expensive costs does little to incentivize the copyright owner to take action.

This is a real problem that creators would face if the decision below is reversed. In some cases, the costs are so great that the creator cannot afford to take a first step, or step far enough down the road. Similarly, if a party with a meritorious defense cannot afford the necessary costs of electronic discovery, experts, and other costs that Petitioner claim are excluded, that party may be discouraged from defending against the claim. This outcome in turn removes an opportunity to develop the contours of copyright law, as the Courts in *Kirtsaeng* and *Fogerty* recognized.

Principles of statutory interpretation confirm that Section 505 should be read consistently with the outcome that copyright policy encourages. Leading scholars similarly have opined that "full costs" means taxable and non-taxable costs. Even the plain language of the statute—in using the word "full" rather than "taxable"—resolves to Respondents' position that "full costs" are exactly that.

In contrast, adoption of Petitioners' proposed interpretation of the law would be inconsistent with the language of the statute, undermine copyright policy, and significantly chill copyright claims. Many copyright owners struggle to meet the high threshold to commence a copyright case, let alone bear the high costs required for experts and electronically stored discovery in order to be

successful. Barring such rights holders from recovery of their full costs if they win would discourage creators from bringing meritorious claims and leave them without an available avenue to enforce their rights. Moreover, Petitioners' proposed interpretation would create a policy that would favor wrongdoers and thereby embolden infringers who would be challenged only by well-funded copyright owners. As longstanding copyright law and policy confirms that categorical bars to recovery should not stand in the way of enforcement of rights and the development of copyright law, the Court should affirm the Ninth Circuit's interpretation of Section 505, giving courts discretion to award a prevailing party their full costs expended in litigation.

ARGUMENT

I. THE NINTH CIRCUIT'S INTERPRETATION OF 17 U.S.C. § 505 TO ALLOW RECOVERY OF "FULL COSTS" ADVANCES THE PURPOSES OF COPYRIGHT LAW

In interpreting the Copyright Act, the courts should take into account the policies and purposes underlying the Copyright Act, which include the incentive for authors to recoup and protect their investments in the creation of copyrightable works for the ultimate benefit of the public. This is what the Ninth Circuit did below in finding that "full costs" means exactly that: full costs.

The essential purpose of copyright law in the United States is reflected in the Constitution's grant of authority to Congress, "[t]o promote the Progress of Science and useful Arts." U.S. CONST. art. I, § 8, cl. 8. In examining copyright laws, the Court has often recognized the importance of interpreting the Copyright Act to further this purpose. *See, e.g.*, *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1986–87 (2016); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526–27 (1994); *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349–50 (1991); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 428–29 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155–56 (1975).

Interpreting the law in light of the purposes of the Copyright Act both rewards creators and serves the public interest. As the Court in *Twentieth Century Music. Corp. v. Aiken* stated, "[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." 422 U.S. at 156. Likewise, in *Fogerty v. Fantasy, Inc.*, when the Court first examined 17 U.S.C. § 505—the statutory provision at issue in this case—the Court explained that "copyright law ultimately serves the purpose of enriching the general public through access to creative works." 510 U.S. 517 at 527.

This Court has recognized the symbiotic relationship between incentives to create and the ultimate public benefit. In each of these seminal cases, as well as the other examples cited above, the Court interpreted copyright law in light of Congress's ultimate goals and considered whether the underlying purposes are best served by the proposed interpretations before the Court. *See* Shyamkrishna Balganesh & Gideon Parchomovsky, *Equity's Unstated Domain: The Role of Equity in Shaping Copyright Law*, 163 U. PA. L. REV. 1859, 1872–82 (2015) ("In area after area of substantive copyright jurisprudence, we find the Court relying on copyright's core goals to glean meaning from otherwise plain statutory language."). In recognizing the complexity of the policies served by copyright law, *Fogerty*, 510 U.S. at 526, the Court unwaveringly has given due consideration to the underlying purpose enshrined in the Constitution that ensures that authors are incentivized to create works for the ultimate promotion of "the progress of science and useful arts." The Court should follow the same approach as this Court has done in the past and give credence to the concept that the rights of authors should be secured for the time period granted in the Copyright Act. If this Court does so, it will recognize that a copyright that cannot effectively be enforced is no incentive at all and, accordingly, will affirm.

A. Awards of "Full Costs" in Copyright Cases Have a Long History in the Law.

Section 505 of the Copyright Act provides that a "court in its discretion may allow the recovery of full costs by or against any party . . . ." 17 U.S.C. § 505. The Section also provides that a court may "award a reasonable attorney's fee to the prevailing party as part of the costs." *Id.* The term "full costs" stems from prior iterations of the Copyright Act, which also authorized recovery of "full costs." *See* 1831 Act, ch. 16, § 12, 4 Stat. 436, 438–39 ("[I]n all recoveries under this act, either for damages, forfeitures, or penalties, full costs shall be allowed thereon . . . ."); Act of Mar. 4, 1909, ch. 320, § 40, 35 Stat. 1075, 1084 ("That in all actions, suits, or proceedings under this Act . . . full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs."); *see also* WILLIAM F. PATRY, 6 PATRY ON COPYRIGHT § 22:221, Westlaw (section updated Nov. 27, 2018) (detailing the statutory history and stating that "copyright laws have always allowed 'full costs'"). However, unlike the current version of the Copyright Act, the award of "full costs" was not always discretionary.

Prior to 1976, the award of "full costs" to a prevailing party in a copyright action was mandatory, whereas an award of reasonable attorney's fees was left to the Court's discretion. *See* 35 Stat. at 1084. Noting that "the discretionary

power of the courts is generally regarded as salutary," the Register of Copyrights recommended that Congress amend the provision to give courts discretionary power over an award of costs as well. *See* REGISTER OF COPYRIGHTS, 87TH CONG., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 74, 109 (Comm. Print. 1961) [hereinafter REGISTER OF COPYRIGHTS, REPORT]. Congress acquiesced and amended the provision in the Copyright Act of 1976 to give courts discretionary power over an award of costs and attorney's fees. *See* H.R. Rep. No. 94-1476, at 163 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5779 (explaining that "[u]nder section 505 the awarding of costs and attorney's fees are left to the court's discretion"); S. Rep. No. 94-473, at 30 (1975) (same).

Courts, which are best situated to evaluate the individual costs of each case, have often exercised their discretionary power pursuant to Section 505 to decide whether a prevailing party should recover their "full costs" and what those costs entail based on the circumstances of the case, just as they have determined equitable awards. *See, e.g.*, *Wyatt Tech. Corp. v. Malvern Instruments, Inc.*, No. CV 07-8298 ABC (RZX), 2010 WL 11404472, at *1–4 (C.D. Cal. June 17, 2010) (awarding a variety of "reasonable" costs under 17 U.S.C. § 505, including costs for computerized research, photocopying and document processing, messenger and delivery, travel and

depositions, telephone chargers, and mediator and expert witness fees), *aff'd*, 526 F. App'x 761 (9th Cir. 2013); *cf.* Jeffrey Edward Barnes, *Attorney's Fee Awards in Federal Copyright Litigation After* Fogerty v. Fantasy*: Defendants Are Winning Fees More Often, but the New Standard Still Favors Prevailing Plaintiffs*, 47 UCLA L. REV. 1381, 1398 (2000); Daniel E. Wanat & Charles D. Bullock, *Copyright Infringement Litigation: Section 505 of the Copyright Act Accords "Evenhanded" Treatment to a Prevailing Defendant on the Issue of Whether to Award an Attorney's Fee*, 25 SW. U. L. REV. 107, 126–28 (1995). However, Petitioners now complain that allowing courts to exercise their discretion to award "full costs" under Section 505 should be curtailed by arbitrary categories contained in a separate title of the U.S. Code. *See* 28 U.S.C. § 1920 (taxation of costs), § 1821 (per diem and mileage for witnesses). As briefly explained in Section I.D., *infra*, this construction of the statute is improper and is not supported by the underlying purposes of the Copyright Act. *See* SHAMBIE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:5 (7th ed. 2018). Nor, as detailed herein, does such a limitation fit within the goals and policies of the copyright laws.

B. Allowing Recovery of "Full Costs" Encourages Parties to Invest in Meritorious Claims That Protect Creators' Rights and Advance the Goals of Copyright Law.

Without assurances that full costs may be available to a creator of innovative and expressive works, a creator who seeks to enforce her rights ultimately may erase the very economic gains created in the Copyright Act. If the creator finds herself having to spend thousands or millions of dollars in costs that can never be recouped, the incentives in the Act are diminished, and, in turn, the works created for the general public good will decrease. This is especially so for the millions of individual creators and small businesses who cannot shoulder non-taxable costs.

As many scholars have pointed out, copyright litigation comes with a high price tag. *See, e.g.*, Sandra M. Aistars, *Ensuring Only Good Claims Come in Small Packages: A Response to Scholarly Concerns About a Proposed Small Copyright Claims Tribunal*, 26 GEO. MASON L. REV. (forthcoming 2018) (manuscript at 5) (on file with authors); Virginia Knapp Dorell, *Picturing A Remedy for Small Claims of Copyright Infringement*, 65 ADMIN. L. REV. 449, 450–52 (2013); Anthony Ciolli, *Lowering the Stakes: Toward A Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999, 1001–06 (2008);

Stephen P. Anway, *Mediation in Copyright Disputes: From Compromise Created Incentives to Incentive Created Compromises*, 18 OHIO ST. J. DISP. RESOL. 439, 449 (2003); *see also* REGISTER OF COPYRIGHTS, COPYRIGHT SMALL CLAIMS 8, 24–26 (2013). According to the American Intellectual Property Association's ("AIPLA") most recent Report of the Economic Survey, the median cost of litigating a copyright infringement lawsuit, inclusive of all costs for pre- and post-trial, including an appeal when applicable, is in excess of $200,000 (if less than $1 million is at risk). AM. INTELLECTUAL PROP. LAW ASS'N, REPORT OF THE ECONOMIC SURVEY 2017 at 44 (2017).[2]

For the millions of individual creators and small business throughout the United States, being able to recoup their costs in litigation may be the deciding factor in whether or not they can commence a case and enforce their rights. This concern is especially critical in cases in which creators are seeking only injunctive relief and are not expecting to recover any monetary damages that might offset some of the costs. Injunctive relief is critical in copyright cases, especially where recoverable damages are limited or otherwise will not adequately protect a creator's

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[2] That number increases to $388,000 (if $1 million to $10 is at risk), $600,000 (if $10 million to $25 million at risk), and $1 million (if more than $25 million at risk). AM. INTELLECTUAL PROP. LAW ASS'N, *supra*.

rights, or where infringement has gone "viral" and injunctive relief is the only remedy to stem the harm to the creator's rights.

Furthermore, preliminary injunctive relief often necessitates the use of expedited discovery, experts who can testify on irreparable harm, and substantive interpretation on points relating to the merits, all of which impose additional costs. *See* 4 MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.06[A][6][a]–[b] (Matthew Bender rev. ed. 2013); 6 NIMMER, *supra*, § 35.02; *Initial Discovery Considerations*, *in* COPYRIGHT LITIGATION HANDBOOK § 14:1 (2d ed. 2018).

Taken together, all of these costs and considerations present a significant obstacle to litigation, especially when there is no monetary recovery to help offset the costs the creator would need to spend to litigate the case through to judgment. When a copyright owner is facing the difficult dilemma of deciding whether to share his creation with the public, and thereby risk not being able to protect that creation or enforce his rights through litigation, the creator may decide to keep the creation private in order to avoid litigation, or decide not to create at all.

Accordingly, discouraging copyright owners from enforcing and protecting their rights through litigation undercuts the policy of incentivizing the creation of and investment in valuable copyrightable

expressive works. Preventing recovery of "full costs" under Section 505 would do just that; whereas, on the other hand, allowing recovery of "full costs" enables copyright owners to have a chance to offset the high threshold costs of litigating a case, so that they may maintain the value of their creative investments by enforcing their rights through litigation. This policy would thereby serve the public good by encouraging copyright owners to continue to create without concern that they would not be able to protect the investment in their work. Thus, consistent with the underlying purposes of copyright law—to encourage creators to create for the public good and to reward those creators who do—copyright owners should be incentivized to use copyright litigation to enforce and protect their rights.

Beyond the reasons discussed above, encouraging parties to bring meritorious claims, and to defend against unmeritorious copyright claims, is central to the policy goals of copyright law. The Supreme Court has repeatedly acknowledged the role fee awards plays in advancing this purpose. The *Kirtsaeng* Court, in addressing the underlying policies in considering attorney's fee awards under the Copyright Act, found that Section 505 "achieves that end by striking a balance between two subsidiary aims: encouraging and rewarding authors' creations while also enabling others to build on that work." 136 S. Ct. at 1986. Thus, the Court concluded, "fee awards under Section 505 should

encourage the types of lawsuits that promote those purposes," *i.e.*, "useful copyright litigation." *Id.*

The Ninth Circuit's interpretation of "full costs" in Section 505 advances the purposes of the Copyright Act for the same reasons that the *Kirtsaeng* Court found Wiley's objective-reasonableness approach to awarding attorney's fees "passes that test." *Id.* In *Kirtsaeng*, the Court held that Wiley's approach, in which courts give "substantial weight" to the "objective reasonableness" of a party's infringement claim in deciding whether to shift attorney's fees, advances the Copyright Act's goals "because it both encourages parties with strong legal positions to stand on their rights and deters those with weak ones from proceeding with litigation." *Id.* The policy is equally applicable here. Allowing a prevailing party to recover the "full costs" expended in litigation, pursuant to Section 505, advances the same objectives by encouraging "useful copyright litigation." *Id.* Indeed, as in *Kirtsaeng*, when a litigant has a meritorious claim or defense, the likelihood that he will recover "full costs" from the opposing party gives him an incentive to litigate the case all the way to end. *Id.* Conversely, when the opposing party does not have a meritorious claim or defense, he is more likely to settle quickly before each side's litigation costs mount. *Id.* at 1987. As the *Kirtsaeng* Court observed, such "results promote the Copyright Act's purposes, by enhancing the

probability that both creators and users (i.e., potential plaintiffs and defendants) will enjoy the substantive rights the statute provides." *Id.*

Two decades earlier, the Court made similar findings, tied closely to the purposes of the Copyright Act. In *Fogerty*, in which the Court established several principles and criteria to guide courts' discretionary decisions on awards under Section 505, the Court stressed the importance of meritorious litigation for furthering the policies of the Copyright Act. *See* 510 U.S. at 527. Notably, the Court emphasized that courts should not treat prevailing plaintiffs or defendants any differently when exercising their discretion under Section 505, as "a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright." *Id.* Such meritorious litigation, whether pursued by a plaintiff or defendant, serves copyright law's ultimate purposes of "enriching the general public through access to creative works" by demarcating the boundaries of copyright law as clearly as possible. *Id.*

Following the reasoning in *Fogerty*, allowing recovery of "full costs" under Section 505 promotes meritorious litigation, and thereby aids in the clear demarcation of boundaries in copyright law, by encouraging parties to fully pursue the claims and

defenses that they believe have merit and will be successful. If parties anticipate that they will be able to recoup the high costs they expend in thoroughly litigating a successful case, they are more likely to commence the case, or initiate the defense, in the first place. This furthers the goals of the Act.

In addition to the reasons specified in *Kirtsaeng* and *Fogerty*, as a matter of policy, the Court should not adopt a construction of Section 505 that would limit the recovery of a party seeking to advance our understanding of copyright law and expand precedent. Both plaintiffs who bring meritorious claims that advance the purposes of the Copyright Act, and defendants who want to defend on reasonable grounds, should be compensated for undertaking such efforts. In either situation, it would further the purposes of copyright law for the party to see a meritorious case through, rather than hesitate to litigate on their own dime.

C. Making Full Costs Available to Parties in the Digital Age Is More Important Than Ever.

In addition to encouraging parties to litigate meritorious claims, allowing recovery of "full costs" under Section 505 also promotes the full and fair adjudication of cases. Just as the *Kirtsaeng* Court recognized the importance of "useful copyright litigation," 136 S.Ct. at 1986, the Court in *Fogerty* stressed that, in order to advance the ultimate

purpose of copyright of "enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible." 510 U.S. at 527.

Copyright cases are unique and require special treatment for several reasons. Unlike most run-of-the-mill litigation, such as cases involving business torts or contract claims, copyright cases often involve specialized or technical issues, particularly in an ever-evolving landscape. Moreover, while music and software cases have always involved experts, the ease of infringement of creative works in the digital age means more copyright cases involving the protection for, or infringement using, software and other technological means. Oftentimes, in such cases, specialized experts are required to address key and novel issues, such as the extent to which a work contains protectable expression, the nature and scope of a violation of rights via digital means, the market harm caused by a new use, or other elements necessary to prove the claim.

For example, in *Fox News Network, LLC v. TVEyes, Inc.*, in which the Second Circuit considered whether TVEyes' service that allows its clients to watch Fox's programming was fair use, the court's consideration of market harm, and the expert testimony on same, weighed heavily in favor of its finding that TVEyes overstepped the boundaries of fair use. *See* 883 F.3d 169, 179 (2d Cir. 2018), *cert.*

denied, No. 18-321, 2018 WL 4385773 (U.S. Dec. 3, 2018); *see also* Rachel Kim, ***Exploring the Bounds of Fair Use: Fox News v. TVEyes***, COPYRIGHT ALLIANCE (Feb. 28, 2018), https://copyrightalliance.org/ca_post/fair-use-fox-news-v-tveyes/. As the Court has recognized, market harm is "undoubtedly the single most important element of fair use." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985). Thus, in such cases where the party's evidence on market harm will tip the balance for or against fair use, expert testimony on that element becomes a necessity for a full and fair adjudication of the case.

Williams v. Gaye, a Ninth Circuit case involving a request for a declaration of non-infringement over the Robin Thicke and Pharrell Williams song "Blurred Lines," presents another example of the importance of expert testimony. There, the testimony from each of the parties' musicology experts, who disagreed sharply in their opinions, spanned several days, and formed the basis for the finding of substantial similarity finding, which the Ninth Circuit affirmed. *See* 895 F.3d 1106, 1117, 1125–27 (9th Cir. 2018). In doing so, the Ninth Circuit emphasized the importance of expert testimony to satisfy the extrinsic test for substantial similarity. *See id.* at 1120. This instance illustrates that, in complex music cases such as *Williams*, the lack of expert testimony could severely frustrate the full adjudication of the case and make it more

difficult for either the judge or jury to reach the correct decision without the benefit of the expert's helpful insight and guidance.

Each of the issues in the two examples described above went to the heart of the case. These cases demonstrate how vital expert testimony can be to the outcome of a lawsuit. However, these experts do not come cheap; they often work independently and rarely, if ever, work on a pro bono basis. For example, a recent survey estimated that the average fee for an expert witness is at $513/hour for trial testimony, $483/hour for deposition testimony, and $383/hour for trial review and case preparation. *See* SEAK INC., 2017 SEAK, INC. SURVEY OF EXPERT WITNESS FEES 1 (2017). Experts in copyright cases may command even higher fees for their specialized knowledge.[3] *Cf.* William H. Wright, *Litigation As A Mechanism for Inefficiency in Software Copyright Law*, 39 UCLA L. REV. 397, 426 (1991) (concluding that the "requirements for sophisticated expert assistance are likely to increase the costs of copyright litigation substantially").

As a result, a party's financial ability to hire one or several of these experts may make the difference

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[3] For example, one member of the Copyright Alliance, who works as an expert, observed that experts in copyright cases typically charge between $400 and $650 per hour, depending on the depth and scope of experience, as well as the scarcity of that particular expert's experience.

between winning and losing its case. Yet, if the party is barred from recouping its expert costs when it prevails, as proposed under Petitioners' limited construction of the statute, the party likely will be unable to engage the expert in the first place, thereby crippling its chances of overall success and putting an incomplete case before the court that may decide the outcome.

This result runs directly contrary to the Court's findings in *Kirtsaeng* and *Fogerty*. *See Kirtsaeng*, 136 S.Ct. at 1986 (finding the promotion of useful copyright litigation advances the purposes of copyright law); *Fogerty*, 510 U.S. at 527 ("[I]t is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible."). Thus, as a matter of policy, unjustified financial exclusions should not prevent parties—whether plaintiff or defendant—from fully and fairly litigating their copyright claims and defenses.

D. The Statute Is Clear and Supports an Award of Full Costs.

In addition to the numerous policy reasons that necessitate that the Court uphold the Ninth Circuit's interpretation, as Respondents argue in their brief, the statute itself dictates a finding that "full costs" means just that—"full costs" expended in litigation. Indeed, as a leading copyright scholar has explained in his treatise, the use of the word "'full in Section 505 means exactly what most people would think:

the prevailing party may, in the court's discretion, recover 100% of its costs, taxable and nontaxable." PATRY, *supra*.

At least one of Petitioners' *amici* has argued that Section 505 should be interpreted differently, such as using an alternative method like corpus linguistics. However, this *amicus* overlooks the well-known canons of statutory interpretation that this Court has employed for decades. *See generally* Linda Jellum, *The Linear Approach to Statutory Interpretation*, AM. BAR ASS'N (2018), https://www.americanbar.org/content/dam/aba/events/administrative_law/2018meetings/04/Statutory%20Interpretation%202018.pdf. An analysis of the statute under these canons would achieve the same result reached by the Ninth Circuit.

Focusing first on the text, the Court should interpret the statute based on the "ordinary, contemporary, common meaning." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). In this exercise, the Court may consider dictionary definitions and common usage. *See, e.g., id.*; *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566–69 (2012); *see also Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1440 (1994). If ambiguous, the Court would then look to intrinsic sources within the title and the Copyright Act and apply relevant linguistic canons. *See, e.g., Roberts v. Sea-Land Servs., Inc.*, 566 U.S.

93, 101, (2012); *see also* SINGER, *supra*, § 46:5, § 47:1. The Court may also look to Congress' specific intent in enacting the statute, and the legislature's overall general purpose for enactment. *See* SINGER, *supra*, § 48:1.

Here, Section 505 states in clear and precise language that, "[i]n any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party . . . ." 17 U.S.C. § 505. Congress did not define "full costs" in the Copyright Act, or accord it special meaning, so the Court should follow the plain meaning of the term. *See* 17 U.S.C. § 101. Under numerous dictionary definitions, "full" means "complete." *See Full*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/full (last visited Dec. 5, 2018); *Full*, DICTIONARY.COM, https://www.dictionary.com/browse/full (last visited Dec. 5, 2018); *Full*, OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/full (last visited Dec. 5, 2018). Also, as the Court noted in *Fogerty*, the use of the "word 'may' clearly connotes discretion." 510 U.S. at 533. Thus, the use of the words "full costs," with the direction that the Court should use its discretion and may include reasonable attorney's fees, supports an award of the full costs expended in litigating the case brought under the title—not "some" costs, based on the few, limited categories delineated in a separate statute, in an

entirely separate title. *Compare* 17 U.S.C. § 505, *with* 28 U.S.C. §§ 1920, 1821.

Section 505 continues, stating that except as otherwise provided by title 17 of the U.S. Code, the court may also include an award of reasonable attorney's fees in the costs. § 505. In this provision, Congress is offering a direction to the court, suggesting that it may include attorney's fees in "full costs." *Id.* Aside from this direction, the statute does not direct courts to look to any other titles of the U.S. Code or otherwise impose any other limitations on what may be included in the cost award. *See id.*; *see also* SINGER, *supra*. Nor could Congress have thought that, in giving the prevailing party attorney's fees, that party could still have to bear the other expenses. Effectively, a prevailing party could win big, yet still lose.

Even if the Court were to find that "full costs," as stated in Section 505, is ambiguous, there is nothing in the section, surrounding sections, or legislative history of the Copyright Act, to suggest that "full costs" in Section 505 meant less than "full costs" expended in litigation. *See generally* H.R. Rep. No. 94-1476; S. Rep. No. 94-473; REGISTER OF COPYRIGHTS, REPORT, *supra*. Section 911 of the same title reiterates that "the court in its discretion may allow the recovery of full costs, including reasonable attorneys' fees, to the prevailing party." 17 U.S.C. § 911. In the legislative history, Congress was clear

that it amended the statute to provide courts with discretion. *See* H.R. Rep. No. 94-1476, at 163; S. Rep. No. 94-473, at 30. "Full costs" is thus the ceiling, not the floor, and Congress' use of this term implied that the discretion lies solely with the courts. *See* H.R. Rep. No. 94-1476, at 163; S. Rep. No. 94-473, at 30.

The Court's prior precedent also dictates that the Court interpret the statute with the basic purpose of copyright law in mind when literal terms are rendered ambiguous. *Twentieth Century Music Corp.*, 422 U.S. at 156; *see Fogerty*, 510 U.S. at 543 (agreeing that certain factors may be used to guide the court's discretion under Section 505, "so long as such factors are faithful to the purposes of the Copyright Act"); *see also* Balganesh & Parchomovsky, *supra*, at 1872–82. As detailed above, the Ninth Circuit's interpretation advances numerous purposes of copyright law, including incentivizing copyright owners to protect their rights through litigation, encouraging parties to bring meritorious claims, and promoting the full and fair adjudication of copyright cases. There is no logical basis to impose an arbitrary prohibition on certain types of costs from an entirely separate title of the U.S. Code, especially if that interpretation would disserve the purposes of the Copyright Act.

Moreover, as William Patry observed, since 1831, "the copyright laws have always allowed 'full costs'

despite changes in other, general statutes governing costs." PATRY, *supra*. Notably, the Copyright Act of 1909 expressly provided "full costs" for all actions arising under the Act but allowed only "taxable costs" for breach of a compulsory license for mechanical reproductions of musical compositions. *Compare* 35 Stat. at 1076, *with id.* at 1084.[4] By specifically designating "full costs" and "taxable costs," Congress indicated when a party is to receive full costs expended in litigation, versus only certain costs taxable by a court. As a result, Patry observed, given the "188-year constant history of copyright

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[4] Section 1(e) of the 1909 Act provides:

> In case of the failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand the court may award **taxable costs** to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this Act, not exceeding three times such amount.

35 Stat. at 1076 (emphasis added).

Section 40 of the 1909 Act provides:

> That in all actions, suits, or proceedings under this Act, except when brought by or against the United States or any officer thereof, **full costs** shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs.

35 Stat. at 1084 (emphasis added).

statutes permitting full costs, the most sensible interpretation of 'full' in Section 505 of the 1976 Act is the commonsense meaning of being able to recover all amounts, taxable and nontaxable alike." PATRY, *supra*.

Accordingly, for all the reasons detailed above, the Court should uphold the Ninth Circuit's interpretation of "full costs" under 17 U.S.C. § 505, and not impose an arbitrary limitation, such as those found in 28 U.S.C. § 1920 or § 1821.

II. PETITIONERS' INTERPRETATION OF THE LAW WOULD UNDERMINE COPYRIGHT POLICY AND SIGNIFICANTLY CHILL COPYRIGHT CLAIMS

In addition to all the reasons enumerated above to affirm the Ninth Circuit's interpretation of Section 505, the Court should also be aware of the serious consequences and potential for abuse that the adoption of Petitioners' construction of the statute would create.

A. Barring a Prevailing Party from Recovering Full Costs Would Discourage Copyright Litigation.

The most significant consequence of the Court's adoption of Petitioners' construction of Section 505 is the deterrent effect on copyright litigation. Prohibiting a prevailing party from recovering full

litigation costs under Section 505 would deter copyright owners from enforcing and protecting their rights through litigation, just as it would discourage defendants from thoroughly defending against claims.

As a practical matter, many individual creators cannot afford the costs that are required to successfully litigate a case. As noted above, overall litigation costs are already very high and, in addition to the high threshold costs to commence or defend against a case, parties are also faced with increased costs that have become commonplace in copyright cases. As discussed above, these costs include fees for a wide variety of expert witnesses, including specialized experts in technology, or experts required to prove key elements of a claim or defense as well as experts on damages, apportionment, and monetary relief issues.

Discovery costs have also increased significantly with the advent of the rules governing electronically stored information ("ESI"). As technology has progressed, discovery platforms have cropped up to collect, process, and produce ESI—at no small cost. For example, a recent study from the RAND Institute for Civil Justice on e-discovery costs, reviewed a variety of cases and reported that costs, per gigabyte of data, range from $125 to $6,700 for collection of ESI, $600 to $6,000 for processing of ESI, and $1,800 to $210,000 for review of ESI.

RAND INSTITUTE FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY 28 (2012). For intellectual property cases, total expenditures for the production of ESI can range from $17,000 to over $7 million. *See id.* at 17–18. Software and cloud-based ESI platforms have become so typical that oftentimes a party may find himself at a disadvantage against his opponent if he is financially unable to use an advanced discovery system.

Without the opportunity to recover these costs, a creator may find herself effectively out of luck, even with pro bono counsel. Although lawyers and legal aid organizations have a culture of providing pro bono hours, experts and e-discovery vendors often do not work for free. Therefore, while a creator may not have to pay attorney's fees, she will still be faced with the dilemma of bearing high costs for necessary experts and ESI, or risk losing her case. Even a few thousand dollars can be a lot for an individual creator, who may be unable to afford the costs for services that could make or break his case. Any pro bono organization offering services or covering litigation costs will also be faced with the difficult choice of taking on the burdensome but necessary costs for expert witnesses and ESI—which may be too high for the organization to bear—or turning down complex or technical cases that should be litigated.

As it currently stands, many individual creators struggle to overcome the high threshold to even commence a case in federal court, which has exclusive jurisdiction over copyright claims. *See* Ciolli, *supra*. Spurred in part by the rising cost of litigation, extra-judicial forums, such as mediation, dispute resolution, and small claims boards, including the one proposed by the Copyright Alternative in Small-Claims Enforcement Act of 2017 (the "CASE Act"), have been proffered as alternatives to aid smaller creators who do not have the financial resources to enforce their rights in federal court. *See generally* John Zuercher, *Clarifying Uncertainty: Why We Need A Small Claims Copyright Court*, 21 MARQ. INTELL. PROP. L. REV. 105 (2017); Dorell, *supra*.[5] Yet, the CASE Act is only one potential alternative, with congressional approval still pending.

Without available avenues to protect and enforce their rights, individual creators will be unable to stave off infringements, thereby curtailing their rights. Such a degradation of a creator's rights is

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[5] The small claims tribunal within the Copyright Office proposed by the CASE Act would offer a streamlined process to render determinations on copyright claims, counterclaims, and defenses. *See Copyright Alternative in Small-Claims Enforcement Act of 2017: Hearing on H.R. 3945 Before the H. Comm. on Judiciary*, 115th Cong. at 2–3 (2018) (statement of Statement of Keith Kupferschmid, Chief Executive Officer, Copyright Alliance).

antithetical to the purposes of copyright law. Treating litigation costs any differently from attorney's fees cannot be reconciled with the policies underlying the Copyright Act. Under the proper interpretation of Section 505, courts should have discretion to determine the cost award based on the individual circumstances of the case and should not be limited to certain categories of costs.

While two *amici* for Petitioners have pointed out that courts exercising their discretion may lead to wide variability in awards, this argument does not weigh in favor of taking away a district court's discretion to allow a party to recoup certain necessary costs, such as those for experts and ESI, as it sees fit. Indeed, there has not been any notable academic, judicial, or legislative attention focused on widely variable cost awards in copyright litigation. Further, as with fee awards, an award of full costs is subject to appellate review. The *amici*'s fear is, thus, merely speculative and hypothetical.

Instead, the Court should use this opportunity to establish principles and criteria to guide lower court decisions on awards under Section 505, just as it did in *Fogerty*. *See* 510 U.S. at 532–34; *see also Kirtsaeng*, 136 S.Ct. at 1985 (stating that in *Fogerty*, "this Court recognized the broad leeway § 505 gives to district courts—but also established several principles and criteria to guide their decisions"). This is the preferable result, as opposed to taking

away discretion entirely. Petitioners' *amici* do not successfully argue that giving district courts discretion on fees has created unpredictability or troublingly inconsistent outcomes.

B. The Equities Should Not Favor Wrongdoers.

Another reason to reject Petitioners' interpretation is because it would create a policy that would favor wrongdoers, and increasingly so. With technological progress and the advent of "viral" copying and sharing it is now easier than ever for a creator to lose control of his intellectual property. *See* Symposium, *Session 3: To What Extent Should Libraries Be Permitted to Engage in Mass Digitization of Published Works, and for What Purposes?*, 36 COLUM. J.L. & ARTS 567, 577 (2013); Pamela Samuelson, *Digital Media and the Changing Face of Intellectual Property Law*, 16 RUTGERS COMP. & TECH. L.J. 323, 324–25 (1990). Copyright owners, especially individual creators and small businesses who can see the fruits of their labor evaporate with a few keystrokes of an infringer, will find it difficult, if not impossible, to enforce their rights if the infringer knows that the plaintiff cannot afford to bear the costs of an expert, ESI, and other costs that may not fall neatly into 28 U.S.C. § 1920. This knowledge will embolden infringers, who will be pursued in litigation only by the most well-funded copyright owners. Where copyright law is designed to

maximize the creation and legal dissemination of works to the public, this result cannot be what Congress intended.

Under Petitioners' interpretation of Section 505, copyright owners seeking to enforce their rights would be forced to bear substantial, non-recoupable costs in order to bring a case against an infringer. Adoption of this interpretation would be antithetical to the underlying goals of the copyright law by requiring copyright owners who are merely seeking to maintain and protect their rights to either stay out of court due to the high costs of litigation or dig themselves into a financial hole in order to protect their rights. Given the Court's consistent history of interpreting the law in line with the goals of the Copyright Act, there is no basis to read the Act to end up with a result that effectively takes away the incentives under the copyright law. In other words, the value of the copyright is hampered when the copyright owner must in every case bear the tax of "non-taxable" costs.

Historically, the amount of costs to award to a prevailing party has lain in the sound discretion of the district court, which is best positioned on the front line to examine the costs and burdens on both sides. Copyright policy should encourage courts to freely use this discretion in copyright cases, especially in matters involving serial infringers and wrongdoers who have engaged in unlawful conduct.

Cf. Barnes, *supra*, at 1394–97. Under Petitioners' construction of Section 505, in contrast, the equities would favor wrongdoers and prevent them from bearing the full costs of their wrongful conduct. This is a bad policy.

Additionally, Petitioners' construction of the statute upsets the balance of potential settlements by providing wrongdoers with increased bargaining power. For example, if a copyright owner commences a case but the wrongdoer escalates the costs—insisting on expert testimony and burdensome ESI, for example—the wrongdoer could potentially use his bargaining power to force a disproportionate settlement that disfavors the creator. The same could be said of bad-actor plaintiffs, who induce individuals with limited resources into accepting a heavily one-sided settlement. *See* Ciolli, *supra*, at 1004. While courts favor settlements, such inherently unfair settlements, especially in cases in which the claims or defenses are frivolous, are an abuse of the system. The wrongdoer should not be able to exercise this level of power over a copyright owner, who is merely trying to protect her rights, with impunity. Indeed, the *Fogerty* Court expressly warned against such unequal treatment between the parties. 510 U.S. at 527, 534. Such cases are exactly the type in which litigants should have full recourse for all costs expended.

It is the Ninth Circuit's ruling that falls in line with the proper policies of the Copyright Act, and which ensures that the concepts that the Court articulated in *Kirtsaeng* and *Fogerty* are upheld.

CONCLUSION

The decision of the Ninth Circuit should be affirmed.

Respectfully submitted.

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